Oh Cheng Eng v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–176–07 OF 2013
MOHTARUDIN BAKI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
19 DECEMBER 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of trafficking drugs — Accused person convicted of offence and sentenced to death — Defence of no knowledge — Whether probable — Appeal against decision of High Court — Whether there was maximum evaluation of prosecution's case and defence — Whether there was failure to appreciate defence — Whether there was failure to disclose prosecution's unused materials — Dangerous Drugs Act 1952 s 39B(1)

While conducting a road block, Sarjan Anuar ('SP3') and Kpl Mohd Basir bin Ibrahim ('SP5') had stopped a vehicle with a Thailand registration number for inspection. The driver who was the appellant, was directed to come down from the vehicle for further inspection and was directed to open the boot. When the appellant opened the boot, SP3 and SP5 found some books, one white box and one mat. The appellant was asked to take out those items from the boot. The appellant was reluctant to do so. SP3 then took out the items from the boot. After the items were taken out from the boot, SP3 lifted the carpet covering a round plywood which was on top of the spare tyre compartment. The drugs, as confirmed by the chemist, to be heroin weighing 22,224.80g, were found underneath the plywood, in the spare tyre compartment. The appellant was charged in the High Court for the offence of trafficking in drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant's defence was that he had no knowledge of the drugs in the vehicle. The appellant's version was that on the material date, he was travelling to Penang in the vehicle belonging to his wife and her partner, Phi Ning. The appellant had wanted to visit his former wife at a hospital in Penang. The trial judge found that the defence had failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted and sentenced to death, hence the appeal. The issues that arose for the court's consideration were whether there was maximum evaluation of the prosecution's case and the defence; whether there was failure to appreciate the defence; and whether there was failure to disclose the prosecution's unused materials.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The trial judge had considered the omission of SP3 to mention the conduct of the appellant in the police report. The omission to state the conduct of the appellant in the police report and in the s 112 statements were not fatal to the prosecution's case. Whilst challenge was mounted on the failure of SP3 and SP5 to mention the conduct of the appellant in the police report and the s 112 statements, SP3 and SP5 were not challenged in cross-examination on their evidence that the appellant had refused to take out the items to uncover the spare tyre compartment, such that the items had be taken out by SP3 himself. Such conduct of the appellant was relevant under s 8 of the Evidence Act 1950 to infer knowledge on the part of the appellant of the drugs found in the spare tyre compartment of the vehicle (see paras 16–17).

(2) The trial judge who had visited the scene was in a better position to make a finding on the condition of the road. Quite apart from that, although there was evidence from SP3 that one can make a U-turn at the said road, there was no evidence that the appellant was in fact at the road or was approaching it when he first realised that there was a road block ahead. In the circumstances, the evidence of SP3 on the possibility of making a U-turn was a neutral evidence incapable of raising an inference favourable to the appellant (see para 20).

(3) Although the appellant did state in his evidence that he had informed about Phi Ning to the recording officer, the name of Phi Ning was never put to the investigating officer or to any of the prosecution witnesses. The trial judge had considered all the evidence as required under s 182A of the Criminal Procedure Code before coming to the conclusion that the appellant had failed to cast a reasonable doubt on the prosecution's case. There was no error in the finding of the trial judge. Looking at the totality of the evidence, the conviction of the appellant was safe (see paras 23, 26 & 30).

[Bahasa Malaysia summary

Semasa menjalankan sekatan jalan, Sarjan Anuar ('SP3') dan Kpl Mohd Basir bin Ibrahim ('SP5') telah menahan kenderaan yang mempunyai nombor pendaftaran Thailand untuk pemeriksaan. Pemandu yang mana adalah perayu, diarah turun daripada kenderaan untuk pemeriksaan lanjut dan diarah untuk membuka but. Apabila perayu membuka but, SP3 dan SP5 menjumpai beberapa buku, satu kotak putih dan satu tikar. Perayu diarah untuk mengeluarkan barang-barang tersebut daripada but. Perayu agak keberatan untuk berbuat sedemikian. SP3 kemudiannya mengeluarkan barang-barang daripada but. Selepas barang-barang dikeluarkan daripada but, SP3 mengangkat hamparan yang melitupi papan lapis bulat yang mana berada di atas tempat tayar ganti. Dadah, seperti yang disahkan oleh ahli kimia, heroin seberat 22,224.80g, dijumpai di bawah papan lapis tersebut, dalam tempat tayar ganti. Perayu dituduh di Mahkamah Tinggi untuk kesalahan pengedaran

dadah, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan mengenai dadah di dalam kenderaan. Versi perayu adalah bahawa pada tarikh material, dia sedang dalam perjalanan ke Pulau Pinang dalam kenderaan kepunyaan isterinya bersama rakan kongsinya, Phi Ning. Perayu hendak melawat bekas isterinya di hospital di Pulau Pinang. Hakim perbicaraan mendapati bahawa pembelaan telah gagal untuk membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Perayu disabitkan dan dijatuhkan hukuman mati, maka rayuan ini. Isu yang berbangkit untuk pertimbangan mahkamah adalah sama ada terdapat penilaian maksima terhadap kes pihak pendakwaan dan pembelaan; sama ada terdapat kegagalan untuk menilai pembelaan; dan sama ada terdapat kegagalan untuk mendedahkan material yang tidak digunakan pihak pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraaan telah mempertimbangkan ketinggalan SP3 untuk menyatakan tingkah laku perayu dalam laporan polis. Ketinggalan untuk menyatakan tingkah laku perayu dalam laporan polis dan dalam pernyataan s 112 tidak fatal kepada kes pihak pendakwaan. Sementara cabaran telah dibangkitkan atas kegagalan SP3 dan SP5 untuk menyatakan tingkah laku perayu dalam laporan polis dan pernyataan s 112, SP3 dan SP5 tidak dicabar dalam pemeriksaan balas atas keterangan mereka bahawa perayu enggan untuk mengambil keluar barang-barang untuk mendedahkan tempat tayar ganti, dengan itu barang-barang tersebut dikeluarkan oleh SP3 sendiri. Tindakan sedemikian oleh perayu adalah relevan di bawah s 8 Akta Keterangan 1950 untuk membuat kesimpulan pengetahuan oleh pihak perayu terhadap dadah yang dijumpai di tempat tayar ganti kenderaan (lihat perenggan 16–17).

(2) Hakim perbicaraan yang melawat tempat kejadian adalah dalam kedudukan lebih baik untuk membuat dapatan atas keadaan jalan. Selain daripada itu, walaupun terdapat keterangan daripada SP3 bahawa seseorang boleh membuat pusingan U di jalan tersebut, tidak terdapat keterangan bahawa perayu sebenarnya berada di jalan tersebut atau mendekatinya apabila dia sedar bahawa terdapat sekatan jalan di hadapan. Dalam keadaan ini, keterangan SP3 atas kemungkinan membuat pusingan U adalah keterangan neutral tidak dapat membangkitkan inferens memihak kepada perayu (lihat perenggan 20).

(3) Walaupun perayu telah menyatakan dalam keterangannya bahawa dia telah memberitahu kepada pegawai yang merekod mengenai Phi Ning, nama Phi Ning tidak pernah dirujukkan kepada pegawai penyiasat atau kepada mana-mana saksi-saksi pihak pendakwaan. Hakim perbicaraan telah mempertimbangkan kesemua keterangan seperti yang dikehendaki

di bawah s 182A Kanun Tatacara Jenayah sebelum mencapai kepada kesimpulan bahawa perayu telah gagal untuk melemparkan keraguan munasabah ke atas kes pihak pendakwaan. Tidak terdapat kesilapan dalam dapatan hakim perbicaraan. Melihat kepada keseluruhan keterangan, sabitan perayu adalah selamat (lihat perenggan 23, 26 & 30).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Husdi v PP [1979] 2 MLJ 304 (refd)
Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113, FC (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Muhammad bin Kadar and another v PP [2011] 3 SLR 1205, CA (refd)
Ng Khai Wei v PP [2013] 2 MLJ 440, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim [2010] 2 MLJ 353, CA (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436, SC (refd)
Yeo Tse Soon & Anor v PP [1995] 3 MLJ 255, CA (refd)

Legislation referred to

Criminal Procedure Code ss 112, 182A
Evidence Act 1950 s 8
Federal Constitution arts 5, 8

Appeal from: Criminal Trial No 45A-01 of 2011 (High Court, Alor Setar)

Ranjit Singh Dhillon (J Kaur, Ranjit & Assoc) for the appellant.
Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The charge against the appellant at the High Court Alor Setar reads:

> Bahawa kamu pada 18 Mei 2010 jam lebih kurang 2.40 petang di KM 15.1 Lebuhraya Utara Selatan (menghala ke Selatan), dalam Daerah Kubang Pasu, di Negeri Kedah Darul Aman telah didapati memperedar dadah berbahaya iaitu Heroin seberat 22,222.80 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The prosecution's case briefly, is as follows. On 18 May 2010, while

conducting a road block at KM 15.1 Lebuhraya Utara Selatan (towards the south), Sarjan Anuar bin Jonit ('SP3') and Kpl Mohd Basir bin Ibrahim ('SP5') had stopped a vehicle with a Thailand registration No AB 4244 SKA for inspection. The driver (identified as the appellant) was directed to come down from the vehicle for further inspection and was directed to open the boot.

[3] When the appellant opened the boot, SP3 and SP5 found some books, one white box and one mat. The appellant was asked to take out those items from the boot. The appellant was reluctant to do so. SP3 then took out the items from the boot.

[4] After the items were taken out from the boot, SP3 lifted the carpet covering a round plywood which was on top of the spare tyre compartment. The drugs, as confirmed by the chemist, SP4 to be heroin weighing 22,224.80g, were found underneath the plywood, in the spare tyre compartment.

[5] At the end of the prosecution's case, the learned trial judge found that a prima facie case had been made out. The appellant was called upon to enter his defence.

[6] The appellant gave evidence under oath. His defence essentially was that he had no knowledge of the drugs in the vehicle. The appellant's version was that on the material date, he was travelling to Penang in the vehicle belonging to his wife and her partner, Phi Ning. The appellant had wanted to visit his former wife at a hospital in Penang.

[7] The learned trial judge found that the defence had failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted and sentenced to death, hence the appeal.

THE APPEAL

[8] Learned counsel for the appellant canvassed the following grounds of appeal:

(a) no maximum evaluation of the prosecution's case and the defence;

(b) failure to appreciate the defence; and

(c) failure to disclose the prosecution's unused materials.

A NO MAXIMUM EVALUATION OF THE PROSECUTION AND THE DEFENCE CASE/ FAILURE TO APPRECIATE THE DEFENCE

[9] We will consider the first and the second grounds together as the issues are overlapping.

B

[10] In finding that the prosecution had proven the element of possession against the appellant, the learned trial judge had relied on the evidence of SP3 and SP5 on the conduct of the appellant prior to the discovery of the drugs. Reproduced below is the finding of the learned trial judge:

C

[16] 74 ketulan mampat yang mengandungi Heroin seberat 22,224.80 didapati berada dalam milikan (*possession*) Tertuduh;

(a) Melalui keterangan saksi-saksi pendakwaan khasnya SP3, SP5 dan SP6 jelas menunjukkan bahawa Tertuduh mempunyai pemilikan terhadap barang kes dadah yang dijumpai terletak di ruang simpanan tayar yang terdapat di dalam boot bahagian belakang kereta yang dinaiki Tertuduh iaitu AB 4244 SKA (P96). Ini berdasarkan kepada fakta bahawa semasa Tertuduh melalui Sekatan Jalan Raya (SJR) yang dilakukan oleh SP3, SP5 dan anggota UPP yang lain, hanya Tertuduh dilihat di dalam kereta AB 4244 SKA dan Tertuduh yang telah memandu kereta P96.

D

E

(b) Sebaik Tertuduh diarah berhenti oleh Sarjan Anuar (SP3) untuk tujuan pemeriksaan SP3 telah mengarahkan SP5 untuk menghampiri pemandu kereta iaitu Tertuduh supaya turun untuk pemeriksaan lanjut.

F

(c) Sebaik SP5 menghampiri Tertuduh, SP5 meminta passport Tertuduh dan Tertuduh telah memberi passport Malaysia kepada SP5 dan SP5 telah meminta Tertuduh menutup suis kereta Tertuduh untuk langkah keselamatan.

G

(d) SP5 kemudiannya telah mengarahkan Tertuduh untuk membuka boot kereta di bahagian belakang kereta berkenaan. Pada mulanya Tertuduh cuba membuka boot kereta dengan punat di bawah kanan dekat pemandu tetapi tidak berjaya. Selepas itu, SP5 mengarahkan Tertuduh turun dan membuka boot tersebut. Semasa Tertuduh turun dari kereta, SP5 menyatakan bahawa Tertuduh turun dengan cara amat perlahan seolah-olah tidak mahu membuka boot kereta itu.

H

(e) Memandangkan Tertuduh gagal membuka boot kereta tersebut, Tertuduh telah ambil kunci dari tempat suis kereta. Semasa SP5 mengiringi Tertuduh dari belakang kereta menuju ke bahagian depan kereta untuk mengambil suis kereta dan berjalan kembali ke belakang kereta. Tertuduh berjalan perlahan seolah-olah tidak mahu membuka boot kereta tersebut dengan pantas.

I

(f) Setelah boot dibuka oleh Tertuduh dengan kunci, SP3 dan SP5 mendapati ada buku-buku, satu kotak berwarna putih dan ada satu

tikar di dalam tempat letak barang kereta berkenaan iaitu di dalam boot. Lalu SP5 menyuruh Tertuduh menurunkan semua barang yang ada. Tertuduh pada masa itu seolah-olah tidak mahu menurunkan barang-barang tersebut sehingga SP3 dan SP5 terpaksa menurunkan barang-barang tersebut ke bawah dan menyusunnya.

[11] Learned counsel submitted that the learned trial judge had misdirected herself when Her Ladyship equated possession of the drugs with possession of the vehicle. Coupled with the fact that the drugs were found in the spare tyre compartment and that there was no evidence to show how long was the appellant in possession of the vehicle prior to his arrest, learned counsel argued that the learned trial judge had erred in finding that the appellant had actual or mens rea possession of the drugs.

[12] In submitting that the learned trial judge had failed to conduct a maximum evaluation of the prosecution's and the defence case, learned counsel highlighted the following finding of the learned trial judge:

[69] Tertuduh dalam pembelaannya tidak menafikan bahawa dadah itu dijumpai dalam kereta tetapi memberitahu Mahkamah bahawa beliau tidak mengetahui kewujudan dadah itu dalam keretanya. Pada masa yang sama Tertuduh juga tidak menyatakan bahawa dadah yang dijumpai di ruang tempat simpanan tayar dalam kereata (Eksibit P96) adalah milik isterinya Mrs Phon Na Phoah atau rakan kongsi isterinya Phi Ning. Walaupun Tertuduh mengatakan kereta, Eksibit P96 itu kepunyaan isterinya, tidak ada bukti dikemukakan kepada Mahkamah yang menunjukkan bahawa kereta itu didaftar atas nama isterinya seorang warganegara Thailand.

[13] Learned counsel's main complaint was that the learned trial judge had made adverse comment against the appellant for not producing proof of the ownership of the vehicle and had chosen to ignore the evidence of SP6 who had admitted that 'Kereta ini adalah kereta pendaftaran Thailand milikan Phon Na Phoah.'.

[14] The learned trial judge, submitted learned counsel, had failed to draw inferences favourable to the appellant at the end of the prosecution's case and had ignored the evidence in making adverse inferences against the appellant. In the circumstances, it was the submission of learned counsel that there was a failure by the learned trial judge to appreciate the evidence from all angles which was fatal to the conviction.

[15] The learned trial judge had relied heavily on the evidence of SP3 and SP5 on the conduct of the appellant which was said to be hesitant and was reacting very slowly when he was asked to open the boot. The appellant was

also said to refuse to take out the items covering the tyre compartment. It was the submission of learned counsel that the learned trial judge had failed to critically examine the evidence of SP3 and SP5 against the police report of SP3 and s 112 statements of SP3 and SP5, where no mention was made on the conduct of the appellant as being reluctant or hesitant to open the boot prior to the discovery of the drugs or of being 'gelisah dan muka pucat lesu'.

[16] With respect, we disagreed with learned counsel. We found that the learned trial judge had considered the omission of SP3 to mention the conduct of the appellant in the police report when Her Ladyship states:

> [59] Sikap Tertuduh yang teragak-agak berjalan lambat tidak dicatit dalam eksibit P93. Merujuk kepada kes *Danny Phiri v PP* [2012] 1 LNS 437, Mahkamah mendapati bahawa intipati penting berkaitan dengan kehadiran Tertuduh seorang diri dalam kereta AB 4244 SKA (P96) dan kewujudan dadah dalam tempat simpanan tayar di bahagian belakang kereta ada dinyatakan dengan jelas dalam P93. Oleh yang demikian sikap Tertuduh yang teragak-agak, berjalan lambat yang tidak disebut dalam P93, tidak mencacatkan kes pendakwaan kerana P93 yang merupakan FIR bukanlah *Encyclopedia* seperti diputuskan oleh kes *Danny Phiri v PP* (supra) di atas; ...

[17] We agreed with the learned trial judge that the omission to state the conduct of the appellant in the police report and in the s 112 statements is not fatal to the prosecution's case. And we noted that whilst challenge was mounted on the failure of SP3 and SP5 to mention the conduct of the appellant in the police report and the s 112 statements, SP3 and SP5 were not challenged in cross-examination on their evidence that the appellant had refused to take out the items to uncover the spare tyre compartment, such that the items had be taken out by SP3 himself. In our view, such conduct of the appellant was relevant under s 8 of the Evidence Act 1950 to infer knowledge on the part of the appellant of the drugs found in the spare tyre compartment of the vehicle.

[18] Also related to the issue of conduct was the evidence of SP3 in cross-examination that there was a U-turn at KM 13.7 and that the road block could be seen in a distance of about 1–2km away as the road was a straight road. It was contended by the defence that if the appellant had knowledge of the drugs, he had every opportunity to make a U-turn. Learned counsel submitted that the learned trial judge had failed to draw an inference favourable to the appellant and that the failure of the learned trial judge to consider the cross-examination must necessarily mean that the learned trial judge had not evaluated the defence.

[19] Reliance was made by the defence on the case of *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 4 CLJ 113. The learned trial judge

distinguished the above case thus:

[32] Di dalam kes tersebut, fakta bahawa tangkapan dilakukan semasa SJR, Responden di dalam kes berkenaan tidak mengelak dari melalui jalan yang sama sedangkan SJR berkenaan boleh dilihat dan jalan raya tersebut merupakan jalan raya yang lurus. Selain itu Respondent tidak menunjukkan apa-apa perlakuan yang mencurigakan dan hanya melarikan diri apabila mendengar perkataan ganja semasa pemeriksaan.

g) Fakta kes di atas sangat berbeza dengan kes yang sedang didengar di Mahkamah yang mana walaupun keadaan lebuh raya berkenaan merupakan jalan lurus tetapi keadaan yang sedikit membukit menghalang pendangan dari susur terdekat iaitu di KM13.7 (pusingan U).

h) Mahkamah telah melawat ke tempat kejadian dan telah melihat keadaan jalan yang dikatakan sedikit mendaki atau membukit. Oleh itu keterangan saksi-saksi pendakwaan terutamanya SP3, SP5 dan SP6 bukanlah satu rekaan tetapi adalah fakta yang memang wujud di tempat kejadian.

i) Selain daripada susur pusingan U berkenaan di KM 13.7 itu, sememangnya tiada lagi jalan susur lain yang boleh digunakan oleh mana-mana kenderaan untuk mengelak SJR berkenaan memandangkan susur kecil di KM 15 telah ditutup atau dihalang oleh papan tanda 'Awas Pemeriksaan Polis' yang diletakkan oleh SP3 dan pasukan.

j) Dengan penjelasan fakta di atas dan keterangan saksi pihak pendakwaan Mahkamah meneliti dan menilai secara maksima dan mendapati bahawa fakta kes yang sedang didengar di hadapan Mahkamah berbeza dengan kes *Ibrahim Mohamad & Anor v PP* di atas.

[20] In our view, the learned trial judge who had visited the scene was in a better position to make a finding on the condition of the road. Quite apart from that, we noted that although there was evidence from SP3 that one can make a U-turn at KM 13.7, we found no evidence that the appellant was in fact at KM 13.7 or was approaching KM 13.7 when he first realised that there was a road block ahead. In the circumstances, we were of the view that the evidence of SP3 on the possibility of making a U-turn is a neutral evidence incapable or raising an inference favourable to the appellant.

[21] On the failure to appreciate the defence, learned counsel submitted on two points, namely on the learned trial judge's comment that the appellant had failed to inform the police as to the owner of the drugs or who had put the drugs in the vehicle and on the belated disclosure of Phi Ning.

[22] Learned counsel submitted that by expecting the appellant to prove who put the drugs in the vehicle, the learned trial judge had reversed the burden of proof on the appellant. On Phi Ning, it was submitted that the learned trial judge had totally ignored the cross-examination of the appellant (pp 122–123: *rekod rayuan Jld* 1) where the appellant had stated that he did mention Phi Ning to the police who took his statement. The learned trial judge, it was submitted, had erred in holding that the failure to put Phi Ning to the prosecution's witnesses was a good reason to reject the defence as a belated disclosure to the defence.

[23] We found that although the appellant did state in his evidence that he had informed about Phi Ning to the recording officer, the name of Phi Ning was never put to the investigating officer or to any of the prosecution witnesses. Therefore the learned trial judge did not err in stating that (p 194: *rekod rayuan Jld* 1):

> [70] Meneliti semula keterangan saksi-saksi pendakwaan, nama dan watak Phi Ning tidak pernah muncul semasa kes pendakwaan sama ada sebagai pemilik bersama kereta P96 atau pun orang yang bersama-sama Tertuduh dari Hatnyai sehingga ke Changloon pada hari kejadian.

[24] And whilst we agreed with learned counsel that a belated disclosure of the defence cannot be a ground for conviction, it is trite that the belated disclosure goes to the credibility and weight of the defence (*Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154; *Ng Khai Wei v Public Prosecutor* [2013] 2 MLJ 440).

[25] As for the learned trial judge's comment on the failure of the appellant to inform the police about the owner of the drugs, it was our view that it did not render the conviction of the appellant unsafe.

[26] The learned trial judge had considered all the evidence as required under s 182A of the Criminal Procedure Code before coming to the conclusion that the appellant had failed to cast a reasonable doubt on the prosecution's case. We found no error in the following finding of the learned trial judge:

> [61] ... Tertuduh semasa ditahan oleh SP3 hanya seorang sahaja dalam kereta dan semasa pembelaan barulah timbul keterangan bahawa Phi Ning pun ada bersama Tertuduh yang kononnya datang dari Hatnyai dan berada dalam kereta bersama Tertuduh hingga ke Changloon.
>
> [62] Semasa kes pendakwaan watak Phi Ning langsung tidak wujud. ...
>
> [63] ... Tertuduh memberitahu Mahkamah bahawa kereta (Eksibit P96) didaftarkan atas nama isterinya Mrs Phon Na Phoah, seorang warganegara Thailand. Kereta itu telah dibeli oleh isteri Tertuduh

bersama kawannya Phi Ning, iaitu rakan kongsinya dalam perniagaan menjual Mee Hokkien. Selain daripada kereta (Eksibit P96) Tertuduh juga memiliki sebuah motosikal dengan no. pendaftaran 441.

[64] Semasa ditahan Tertuduh mengaku bahawa beliau seorang sahaja yang berada dalam kereta (Eksibit P96). Walaupun sebelum sampai di sekatan jalan raya, rakan kongsi isterinya (Phi Ning) ada bersama tetapi Phi Ning telah turun di Changloon sebelum sampai ke tempat Tertuduh ditangkap. Keterangan Tertuduh seperti di atas sama dengan keterangan Tertuduh seperti di atas sama dengan keterangan saksi-saksi pendakwaan dan dengan itu menguatkan lagi keterangan pendakwaan.

[65] ...

[66] Berdasarkan keterangan Tertuduh di atas, Mahkamah membuat kesimpulan bahawa Tertuduh mempunyai kawalan dan jagaan terhadap semua dadah seberat 22,240.80 gram yang dijumpai dalam kereta yang dipandu oleh Tertuduh dan hanya Tertuduh seorang sahaja yang berada dalam kereta itu semasa ditahan dan diperiksa. Selaras dengan itu, Mahkamah memutuskan bahawa Tertuduh ada 'power to deal with the drugs'. ...

[67] Tertuduh seterusnya memberitahu Mahkamah bahawa beliau dalam perjalanan ke Pulau Pinang untuk melawat bekas isterinya yang sedang dirawat di Pulau Pinang tetapi yang agak aneh, Tertuduh tidak tahu bekas isterinya dirawat di wad berapa dan di tingkat mana. Dengan hormatnya Mahkamah tidak dapat mempercayai keterangan Tertuduh. Pada Mahkamah, keterangan itu adalah rekaan semata-mata. Jika benar Tertuduh ingin melawat bekas isterinya tentulah Tertuduh ingat nombor bilik atau sekurang-kurangnya tingkat mana wad yang hendak dilawati itu terletak. ....

FAILURE TO DISCLOSE THE PROSECUTION'S UNUSED MATERIAL

[27] At the end of the prosecution's case, after the learned trial judge called upon the appellant to enter his defence, the defence made an application to interview witnesses and for copies of the s 112. In refusing the application for the witnesses' statements, the learned trial judge referred to *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2010] 2 MLJ 353 where this court had referred to *Public Prosecutor v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 and *Husdi v Public Prosecutor* [1979] 2 MLJ 304.

[28] In submitting that the withholding of the unused statements resulted in procedural unfairness to the appellant and a breach of arts 5 and 8 of the Federal Constitution, learned counsel for the appellant cited the Singapore Court of Appeal decision in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 and the Brunei Court of Appeal decision in *Yeo*

A *Tse Soon & Anor v Public Prosecutor* [1995] 3 MLJ 255.

[29] We found no merits in the submission of learned counsel. The appellant was most certainly entitled to have copies of documents, but the documents must be relevant to the issues for adjudication (see *Raymond Chia Kim Chwee & Anor*). We were not persuaded that the s 112 statements were relevant to the defence. We therefore found no reason to disturb the finding of the learned trial judge in dismissing the application by the appellant for the witnesses' statements.

[30] In our judgment, looking at the totality of the evidence, the conviction of the appellant is safe. We therefore unanimously dismissed the appeal and we affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Afiq Mohamad Noor